

CALIFORNIA CODE OF REGULATIONS

TITLE 2. Administration

Division 2. Financial Operations

Chapter 3. Department of General Services

Subchapter 8. Office of Small Business Procurement and Contracts

Article 1. General Provisions

§1896. Definition of Terms As Used in This Subchapter.

(a) "Business Concern" means:

(1) an entity organized for profit, including but not limited to, an individual, partnership, corporation, joint venture, association or cooperative; and

(2) for purposes of the Prompt Payment Act, California Government Code Section 927 et seq., a duly authorized non-profit corporation.

(b) "Affiliate" means a business concern which is a subsidiary of or owned in part by another business concern such that the applicant business concern is subject to the control of a non-applicant business concern(s). As an alternative to actual ownership, an affiliation may be based upon the existence of other appropriate factors including common management, shared or common employees and existing contractual relationships: Provided, however, that the restraints imposed on a franchisee by its franchise agreement shall not be conclusive in determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, so long as the franchisee maintains the right to profit from its efforts, commensurate with ownership and bears the risk of loss or failure. In the following circumstances there will be a presumption that business concerns are affiliates, however, such presumption may be rebutted by clear and convincing evidence that an affiliation does not, in fact, exist;

(1) If the concern applying for classification as a small business has been assisted by another concern, which is engaged in a similar or commonly related business activity, to meet bonding or other security requirements, and the assisting concern is listed or otherwise designated as a subcontractor or supplier for more than 40% of the contract price required to be performed per the prime bid.

(2) If the controlling or majority owners of concerns which are engaged in similar or commonly related business activity are familiarly related, as defined herein, and have established a business or financial relationship between them.

(3) If 70% or more of the annual receipts for a business concern's preceding fiscal year are derived from the sale, lease or rental of goods supplied by a single manufacturer or supplier and such goods have been acquired by such business concern for:

(A) More accommodating terms and conditions than generally offered by the manufacturer or supplier to other customers; or

(B) A lesser price than generally offered by the manufacturer or supplier to other customers.

(c) "Control" means the authority or ability to regulate, direct, dominate or directly influence the day-to-day operations of any business concern. Every business concern is considered as having one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative, and it is immaterial whether it is exercised so long as the power to control exists. If the concern under consideration is a corporation, it should be noted that a party is considered to control or have the power to control a business concern if such party controls or has the power to control fifty percent or more of its voting stock. In addition, a party is considered to control or have the power to control a concern even though such party owns, controls, or has the power to control less than fifty percent of the concern's voting stock if the block of stock such party owns, controls, or has the power to control, is large as compared with any other outstanding block of stock. If two or more parties each owns, controls, or has the power to control less than fifty percent of the voting stock of a concern and such minority block is equal or substantially equal in size, and large as compared with any other block outstanding, there is a presumption that each of such parties controls or has the power to control such concern; however, such presumption may be rebutted by clear and convincing evidence that such control or power to control, in fact, does not exist.

If a concern's voting stock is distributed other than as described above, its management (officers and directors) is deemed to be in control of such concern. Where more than one class of stock is authorized, all classes of stock and/or subscription agreements may be considered in determining whether the applicant is subject to the control of another entity.

(d) "Conglomerate" means a business concern made up of three or more companies that are legally authorized to do business, simultaneously, within the same or related industries. Factors which may be considered in determining whether the applicant business concern is part of a conglomerate include, but are not limited to, the following:

- (1) Authority and restrictions as indicated in the articles of incorporation, by-laws, partnership agreements and/or other business agreements and documents.
- (2) The financial interest and/or participation in any other business by any owner or key personnel;
- (3) Past and current employment history of owners involved in the business.
- (4) Members of the board of directors and corporate officers;

(5) Experience, training and expertise of any owners;

(6) Recent changes in ownership and/or control of the business;

(7) Financial obligations to and capital contributions from non-owners of the business concern;

(8) Any documents which indicate who has ultimate authority to make policy and management decisions that legally obligate the business concern. Business concerns that are affiliated with a conglomerate shall be conclusively presumed to be a conglomerate.

(e) "State Agency" means all State departments, offices, boards, commissions, institutions, State universities and colleges and special organizational entities within State government.

(f) "Joint Venture" means an association of business concerns established for the purpose of engaging in and carrying out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skills or knowledge, but without creating a partnership or a corporation. Additionally, the Joint Venture Agreement must provide that there shall be a distribution of costs, profits, losses and liabilities among all coadventurers in proportion to their contribution to the enterprise.

(g) "Manufacturer" means a business as defined in Government Code Section 14837(c).

(h) "Industry Dominance" means the exercise or ability to exercise a controlling or major influence, on a statewide basis, in a kind of business activity or field of operation in which a number of business concerns are primarily engaged. In determining whether a business concern is dominant in its field of operation, the following criteria, among others, shall be considered: volume of business; financial resources; competitive status or position; ownership or control of materials, processes, license agreements and facilities; sales territory and nature of business activity. Conglomerates, as defined, shall be presumed to be dominant in their field(s) of operation. Such presumption may be rebutted by clear and convincing evidence that the conglomerate is not, in fact, capable of asserting a major influence or indirect control in the given industry or field of operation. Such evidence may be found on the face of the application or in other documents requested by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, pursuant to Section 1896(d) of this subchapter.

(i) "Bid" means 1) an offer or proposal of terms made with the purpose of securing the acceptance thereof, by a state agency, thereby creating a contract, or 2) an invitation or solicitation of bids where the state reserves the right to make multiple awards pursuant to such invitation or solicitation.

(j) "Average Annual Gross Receipts" means all pecuniary gross receipts (less returns, allowances and interaffiliate transactions), the assignment of such receipts notwithstanding, of a business concern from whatever source derived, as entered or to have been entered on its regular books of account for its most recently completed fiscal year (whether on a cash, accrual, completed contracts, percentage of completion or other commonly recognized and accepted accounting method). Proof of average annual gross receipts must be provided in the form of either:

(1) A copy of completed tax returns (with all schedules), as filed with the United States Department of the Treasury, Internal Revenue Service, for Federal income tax purposes; or

(2) Audited financial statements covering the applicant business concern and all affiliates; or

(3) If the documents required under 1 or 2 above are unavailable, an unaudited financial statement covering the applicant business concern and all affiliates; and

(4) A duly sworn and notarized statement which attests to the truthfulness and accuracy of the unaudited financial statement as well as the authority of the signatory to make such representation regarding the applicant business concern and a promise to provide the information required under 1 or 2 above within 90 days of the effective date of certification.

Average annual gross receipts will be determined by adding the gross receipts for the applicant concern and any affiliates during the previous three tax years and dividing by three. Should a sole proprietorship or partnership be in business for less than three tax years, additional prior year(s) personal and affiliate gross receipts will be considered to complete the aggregate gross receipts for the previous three years to be averaged. Should a corporation be in business for less than three tax years, the average annual gross receipts will be determined by dividing the total gross receipts by the number of tax years the corporation has been in business.

If a concern which has been in business more than 12 months changes its tax year (fiscal year), its annual receipts will be determined from its most recently completed 36 month period in business. Once the new fiscal year has been completed, the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources, may require a new application which sets forth the applicant's annual receipts under the new fiscal year cycle.

If a concern has acquired an affiliate during the applicable tax year, it is necessary in computing the applicant's annual receipts, to include the affiliate's receipts during the entire applicable tax year, rather than only its receipts during the period in which it has been an affiliate. The receipts of a former affiliate are to be included if such concern was an affiliate during a portion of the applicable tax year.

(k) "Familial Relationship" means relationships between the following family members: Husband, wife, child, stepchild, mother, father, grandparent, brother, sister, grandchild, stepbrother, stepsister, stepmother, stepfather, mother-in-law, father-in-law, brother-in-law, sister-in-law, daughter-in-law, son-in-law, and if related by blood, uncle, aunt, niece, nephew.

(l) "Small Business" as used with regard to a public works contract as defined in Division 2, Part 1, Chapter 1, Section 1101 of the California Public Contract Code, means a business concern which has been issued a currently valid Contractor's license by the State of California and meets the following requirements:

(1) Has requested the status of a small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.

(2) Is not, together with any affiliate(s), dominant in its field of operation(s).

(3) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.

(4) Together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three tax years.

The firm shall also set forth on the bid form the name and nature of any business which has assisted it in obtaining bonding for submission of the bid with respect to which the firm seeks a Small Business Preference, and if the firm which rendered bonding assistance is listed as a subcontractor on such bid there shall be set forth on the bid form the percentage of the contract price called for by the prime bid which will be performed by subcontractor.

(m) "Small Business" as used with regard to an agreement for the purchase, lease or rental (with option to purchase) of goods means:

(1) A business concern which has requested the status of small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.

(2) Is not, together with any affiliate(s), dominant in its field of operation(s).

(3) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.

(4) A non-manufacturer, together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three years.

(5) A manufacturer, together with any affiliates has 100 or fewer employees.

(n) With regard to services the following shall apply:

(1) "Service firm" means any business concern doing business with or proposing to do business with the State of California pursuant to an agreement for the performance of services.

(2) "Agreement for the performance of services" means any contractual arrangement not involving the following:

(A) Public works contracts as defined by the provision of Division 2, Part 1, Chapter 1, Section 1101 of the California Public Contract Code.

(B) The sale, manufacture, lease, or rental, with the option to purchase, of goods; or

(C) Arrangements where the services provided are merely incidental to the sale, manufacture, lease or rental, with the option to purchase, of goods.

(3) "Small Business," when used in reference to a service firm means:

(A) A business concern which has requested the status of small business and has been approved as such by the Office of Small and Minority Business, also known as the Office of Small Business Certification and Resources.

(B) Is not, together with any affiliate(s), dominant in its field of operation(s).

(C) Is independently owned and operated, the principal office of which is located in California, and the officers, in the case of a corporation, or owners in all other cases, of such business domiciled in California.

(D) Together with any affiliates, has 100 or fewer employees, and average annual gross receipts of ten million dollars (\$10,000,000) or less over the previous three tax years.

(o) "Agent" means one who (1) undertakes to transact some business, or to manage or control some affair for a principal by authority and on account of such principal and to render an account of it to such principal, or (2) is authorized by another to act for him or her, one entrusted with another's business or, (3) represents and acts for another under the contractual relationship of agency.

NOTE

Authority cited: Sections 14839 (g) and 14843, Government Code. Reference: Section 14838, Government Code.

HISTORY

1. New Subchapter 8 (Sections 1896, 1896.2, 1896.20 and 1896.30) filed 4-19-74 as an emergency; designated effective 5-1-74. Certificate of Compliance included (Register 74, No. 16).
2. Amendment of subsections (k)(3) and (l)(1) filed 12-31-75 as an emergency; designated effective 1-1-76 (Register 76, No. 1).
3. Amendment of subsections (k) and (l) filed 6-19-78; effective thirtieth day thereafter (Register 78, No. 25).
4. Amendment filed 9-25-78; effective thirtieth day thereafter (Register 78, No. 39).
5. Amendment of subsection (m)(1)(B) filed 10-13-78; effective thirtieth day thereafter (Register 78, No. 42).
6. Editorial correction of NOTE filed 12-6-82 (Register 82, No. 50).
7. Amendment of subsections (l) and (m) and new subsection (n) filed 10-7-85; effective upon filing pursuant to Government Code Section 11346.2(d) (Register 85, No. 41).
8. Amendment filed 6-6-88 as an emergency; operative 6-6-88 (Register 88, No. 25). A Certificate of Compliance must be transmitted to OAL within 120 days or emergency language will be repealed on 10-4-88.
9. Certificate of Compliance including amendment of subsection (k) transmitted to OAL 10-4-88 and filed 11-2-88 (Register 88, No. 46).
10. Change without regulatory effect amending section filed 3-30-99 pursuant to section 100, title 1, California Code of Regulations (Register 99, No. 14).